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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of)

RAYMOND W. CLANTON)

LOREN F. SELZNICK)

For Construction Permit)
for a new FM Station on)
Channel 279A in El Rio,)
California)

MM Docket No. 93-87

File No. BPH-911216MC

File No. BPH-911216MD

To: Administrative Law Judge
John M. Frysiak

MOTION FOR SUMMARY DECISION AND DENIAL OF APPLICATION

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December 23, 1993

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SUMMARY

Adverse summary decision against the application of Loren F. Selznick is sought on the outstanding issues of whether she was financially qualified when she filed her application and whether she is currently financially qualified. Based on documents submitted and deposition testimony of Selznick and Joseph Dailey, the financing source, there remains no questions of fact, and the issues may be resolved without evidentiary hearing.

It is shown that Selznick had no written financial commitment from Dailey when she filed her application. She did not know the amount of money he was to provide, nor did she have knowledge of the terms and conditions he would impose. Selznick did not have a copy of his financial statement, and the oral information about his finances which he supplied to her was insufficient to demonstrate that he had the necessary funds. Further, her cost estimate was lacking a number of items, resulting in even the amount of money she claimed to have being inadequate.

Selznick is not currently financially qualified. She states that she has \$151,210 available to her. Her construction cost estimate remains at \$360,070. Her present finances are clearly insufficient.

Commission precedent calls for grant of adverse summary decision and denial of Selznick's application.

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MOTION FOR SUMMARY DECISION AND DENIAL OF APPLICATION

Raymond Clanton, by his attorney, respectfully moves for summary decision on the outstanding financial issue against Loren A. Selznick in the above-captioned proceeding. In support thereof, the following is shown.

This Motion is filed pursuant to Section 1.251 of the Commission's rules which provides that motions for summary decision may be filed up to 20 days before the start of the hearing. The hearing on this issue is scheduled to commence on January 12, 1994; accordingly, this Motion is timely.

This Motion addresses Issues (I) and (III) which were added against Selznick by Memorandum Opinion and Order, FCC 93M-625, released September 30, 1993¹. These are both basic qualification issues. Selznick must prevail on both issues to

¹ Issue (II), which is a misrepresentation issue, need not be resolved at this time.

be considered for a grant of her application. Hence, adverse decision on either issue mandates denial of her application. It is shown herein that she is unqualified on both issues and her application must be summarily denied.

The specific issues are:

(I) To determine whether Selznick falsely certified in her application that she was financially qualified, and if so, the effect thereon on her qualifications to become a Commission licensee;

(III) To determine whether Selznick is financially qualified to construct her station and operate it for three months without revenue, and if not, the effect thereon on her qualifications to become a Commission licensee.

Summary decision is appropriate when there are no genuine and material issues of fact to be determined by an evidentiary hearing. The relevant facts on these issues, presented below, are not in dispute. Relevant documents supporting these facts appear in the attached appendix.

Issue I. Selznick's initial financial certification.

The undisputed facts are:

In her application as initially filed, Selznick certified that "sufficient liquid assets are on hand or that funds are available from committed sources to construct and operate the requested facility for three months without revenue." She did not research Commission decisions or policy statements regarding financial qualifications before filing her application. (S. Dep. 155-6²)

² Pages of Selznick's deposition are identified as "S. Dep.", and those of Dailey's deposition as "D. Dep."

Selznick prepared a detailed budget of the cost of construction and initial operation prior to filing her application. The total estimated cost was \$360,070, the figure provided in Selznick's application.³ In response to Question 3 of Section III of the application, Selznick identified Joseph P. Dailey as the source of \$361,000 which she would use to meet her estimated costs. She mentioned no other source of financing.

At his deposition, Dailey was unclear on the amount of money Selznick had requested in 1991. He recalled Selznick had stated that the station could be built for \$350,000. (D. Dep. 74) He thinks that included some working capital, but is not clear on that. (D. Dep. 75-76) She told him roughly how her figure was broken down. (D. Dep. 31, 43-4)

Dailey did not pay close attention to the figure Selznick gave him because at that point they had not discussed Dailey doing the financing; she was trying to get financing from another group. (D. Dep. 58) In 1993, Selznick asked him to

³ Selznick's budget did not include legal costs (S. Dep. 124), the 302 filing fee (\$115) (S. Dep. 128), the STL filing fee (\$85) (S. Dep. 129) and she was not sure if the cost to prepare STL application was included there or not. Selznick was not permitted by her counsel to testify whether the hearing fee of \$6,000 was included. (S. Dep. 124). Her budget did not include the cost of Selznick moving from New York to California. (S. Dep. 133-4) Thus, Selznick's actual financial needs are somewhat greater than the amount stated in her application, and significantly exceed the \$361,000 which her application asserted was available to her from Mr. Dailey. By itself, this discrepancy is sufficient to warrant a finding that Selznick was not financially qualified when she filed her application.

sign a declaration in which she said she needed \$360,000 in 1991, but he is not sure that is the number they were talking about in 1991. Only upon reviewing his August 1993 Declaration at his deposition did Dailey accept \$360,070 as the figure Selznick may have given him in 1991, but even then he still recalled the amount as \$350,000. (D. Dep. 80, 84)

Dailey's eventual offer to provide financing came about as follows. In about the first or second week of November 1991, Selznick told Dailey that she was trying to get financing from a group involving Derrick Cephas. She was concerned that the Cephas group might not give her a commitment by the time the application had to be filed. Dailey then told Selznick over the telephone, "Well, hell, I'll provide the financing. I think this is a hell of a deal. Its a much better deal than anything I ever saw." During a telephone call later that month, Dailey confirmed to Selznick that he was serious. (D. Dep. 46-7, 57) He did not provide a written indication of his willingness to provide the funds. He asked if a "commitment letter", i.e. a formal written commitment to lend funds, were necessary, and she said it was not. (D. Dep. 55)

Dailey never said he would provide a specific dollar amount. He simply said he would "provide the financing." (D. Dep. 84) Selznick made no notes of that conversation. (S. Dep. 149)

Prior to the filing of Selznick's application, she and

Dailey did not discuss what collateral or security he would require from her for the loan. (S. Dep. 158 (lines 4-8, 21)) They did not discuss any of the terms under which Dailey would provide the financing. (D. Dep. 58)

Dailey stated in his deposition that he would definitely take on the role as an advisor to Selznick with regard to his investment. If she formed a corporation, he would probably want to be on the Board of Directors. There is no indication that he ever advised Selznick of these matters. Dailey had advised Selznick to hire someone with a lot of experience and to give that person some equity in her station. (D. Dep. 77)

In 1991, Selznick told Dailey that he would have to provide a balance sheet at some later time. (D. Dep. 52) In another call, with Dailey in California and Selznick in New York, Dailey offered to read over the telephone from his balance sheet, and told her she could have a copy of his balance sheet whenever she needed it.⁴ (S. Dep. 149, D. Dep. 53) He asked her about the Commission's definition of liquid assets, but Selznick did not know it. (D. Dep. 52) They decided that his cash on hand and the amount owed to him by Breed, Abbott & Morgan were more than sufficient to demonstrate he had what was needed. He gave Selznick those figures from his balance sheet, as they appeared on his computer screen, and stopped there. The law firm's payments were due

⁴ Dailey keeps his balance sheet on his computer. He updates it regularly, and does not print out a copy unless one is needed for a particular purpose. (D. Dep. 109)

to be paid in a relatively short period of time, so he decided they would qualify as liquid. Selznick did not have Dailey's balance sheet on her computer. (D. Dep. 53)

According to his November 1991 balance sheet, which was first provided to Selznick in August 1993 (D. Dep. 54), Dailey had cash of \$218,000, (Breed Abbot) partnership profits due him of \$230,864, and partnership inventory interest of \$150,368. These total \$599,232.

Dailey's liabilities consisted of a mortgage of \$975,000 and a bank loan of \$44,970. There is no indication on his balance sheet what his mortgage payments were. A copy of Dailey's November 1991 balance sheet is attached. He did not tell Selznick his net income after federal income tax for 1990 or 1989 until July 1993. (S. Dep. 154, D. Dep. 109-110)

Dailey did not furnish Selznick with any documentation regarding his financial situation prior to December 1991. (D. Dep. 33). She did not ask for anything from him in writing prior to August 1993. (D. Dep. 55) The first time Dailey provided Selznick with a copy of his November 1991 balance sheet was in August 1993. She learned of his debts by viewing that balance sheet. (D. Dep. 33-4, 53-4)⁵

In July 1993, Selznick first raised with Dailey the question of the terms of his financing, mentioning that

⁵ In an inconsistent statement given later in his deposition, Dailey stated that he told Selznick in 1991 that his only significant debt was the mortgage on his house. (D 85) Even then, Dailey did not testify that he specified the amount of the mortgage or the monthly payments.

Clanton's attorneys had brought it up in a filing at the Commission. At that time Dailey told her that his offer contained implicit terms. "And you're roughly talking about 4 to 5 percent above prime. You're talking about a security interest in the hard assets. You're probably talking about some form of five-year note and probably a personal guarantee... Whatever she could get from a bank, if a bank was willing, those were the terms." (D. Dep. 89) Dailey did not communicate these terms in connection with his commitment to provide the financing, either the \$40,000 or the \$350,000 or \$360,000. It was only when the subject arose in connection with the hearing that Dailey first mentioned the financing terms to Selznick. (D. Dep. 90)

Legal Conclusions:

As the Presiding Judge noted in enlarging the issues, applicants are now required to have documentation of their funding in hand at time of financial certification. It is undisputed that Selznick had no documentation from her sole source of funds, Joseph Dailey. On this basis alone, Selznick was not financially qualified when she filed her application.

Moreover, even the oral communications between Selznick and Dailey did not provide reasonable assurance of the funds, as that term is defined by the Commission. At the time Dailey advised Selznick that he would give her the financing, he was not even aware of the amount of money involved. He had in mind the sum of \$350,000, an amount insufficient to meet

Selznick's identified costs of \$360,070.⁶

In addition, Selznick and Dailey did not discuss any of the terms of the loan. No mention was made of the interest rate, repayment arrangements, or collateral to be required. An essential part of an applicant having reasonable assurance of a loan is its knowledge of and acceptance of the terms of the loan. "It was incumbent on [the applicant] to firm up the terms and provisions of the purported bank loan." Peter Joseph Devlin and Patricia Eve Devlin, 7 FCC Rcd 2499 (Rev. Bd. 1992). Affirmed, 7 FCC Rcd 6846. The failure to discuss the specific terms of the loan negates reasonable assurance thereof. Imagists, 6 FCC Rcd 7440 (Rev. Bd. 1991).

It is clear that Dailey had in mind specific terms for his loan to Selznick. In addition to the interest rate, repayment provisions, and collateral, he wanted to monitor her station's performance quite closely. Dailey had already given Selznick advice concerning employees, even urging her to make equity available. As the financier, Dailey would expect Selznick to take his advice. Should she form a corporation, Dailey desires a seat on its Board of Directors. Dailey did not communicate any of these requirements to Selznick. There simply was no meeting of the minds, and Selznick lacked reasonable assurance of Dailey's funds.

⁶ As noted in footnote 3 above, Selznick omitted several thousand dollars in costs from her budget. Thus, her actual budget estimate was greater than the sum of money Dailey agreed to provide, even if that were \$361,000.

Although she did not raise the point in her opposition to Clanton's petition to enlarge issues, Selznick stated in her deposition that her reading of the instructions to Form 301 indicate that a written loan commitment is not required when an individual, as opposed to a financial institution, is the lender. The Form's instructions were the only documents she consulted, although she apparently did consult her communications counsel, for she has claimed privilege on many letters between her counsel and herself.

Selznick failed to comply with a number of requirements stated in the instructions. They specify that by certifying her financial qualifications, Selznick "is also attesting that [she] can and will meet all contractual requirements, if any as to collateral, guarantees,..." As noted above, Selznick could not make such attestation, as she was unaware of what Dailey's conditions might be.

In A.P. Walter, Jr., 6 FCC Rcd 875, 878 (Rev. Bd. 1991), the Board indicated that, while the absence of certain required terms from the loan commitment letter, standing alone, may not be fatal, it emphasized that "...it is axiomatic that there can be no reasonable assurance of the availability of financing where virtually none of the basic terms are present in a bank letter, including repayment terms, interest rate and required collateral..." Here, there was neither a letter, nor a discussion of the terms.

The instructions to the form require Selznick to have on hand, when she filed her application, Dailey 's balance sheet or financial statement. That document had to show all liabilities and current and liquid assets sufficient to meet current liabilities; financial ability to comply with the terms of the agreement to furnish funds; and net income after Federal income tax received for the past two years. Selznick concedes that she had no such document.

Accordingly, Selznick did not comply with the specific requirements of the instructions to Form 301. Any attempt to base her financial certification on compliance with the instructions would be ineffective.

An additional basis for finding that Selznick lacked reasonable assurance of Dailey's funds is that she lacked sufficient financial information on Dailey to determine that he had the funds to make the loan. In 1991, Dailey orally provided Selznick with only certain items from his balance sheet, cash and receivables from his former law firm. He did not give her information on his liabilities. The Commission requires both assets and liabilities to be disclosed. Without a complete picture of Dailey's liabilities, Selznick had no way of knowing whether his assets would be there when she needed them and could not rely on Dailey's oral promise.

In sum, Selznick lacked reasonable assurance of the funds to construct and operate her station at the time her application was filed because:

1) There was no contemporaneous writing commemorating Dailey's commitment;

2) There was no discussion of the terms and conditions of Dailey's loan, making it impossible for Selznick to have agreed to them;

3) There was no documentation of Dailey's finances;

4) Oral discussion of Dailey's finances did not provide information on his liabilities, so Selznick was unable to determine that he had sufficient net liquid assets to meet his funding obligation.

Any one of these four findings is sufficient to hold that Selznick lacked reasonable assurance of financing when she filed her application. Issue I must be resolved adversely to Selznick. Aspen FM, Inc., 6 FCC Rcd 1602 (1991).

Issue III. Selznick's current financial qualifications.

Selznick's petition to amend to reduce the amount of money necessary to construct and operate her station for three months without revenues was rejected. Memorandum Opinion and Order, FCC 93M-583, released September 13, 1993. The figure of \$360,070 remains the estimated cost of construction and initial operation.

At her deposition, Selznick estimated she had the total of \$151,210 available to construct and operate for three months the El Rio Station. (S. Dep. 173) Mr. Dailey is to provide \$40,000, with Selznick providing the rest. (S. Dep. 174).


Legal conclusions:

To be financially qualified at the present time, Selznick must demonstrate that sufficient funds are available to her to meet her estimated construction and three months' operating costs. Her application continues to state that she requires the sum of \$360,070. However, Selznick claims no more than \$151,210 in currently available funds. There is no need to investigate whether that full amount is truly available, for it is clearly inadequate. Accordingly, Selznick is not now financially qualified and summary decision adverse to her is appropriate. Roxanne Givens, 5 FCC Rcd 5371 (Rev. Bd. 1990) (Subsequent history omitted).

With denial of Selznick's application, Clanton becomes the sole remaining applicant. As there is no bar to the grant of his application, it may be granted at this time.

Respectfully submitted,

RAYMOND W. CLANTON

By 

Jerrold Miller
His Attorney

December 23, 1993

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CITED PAGES OF DAILEY'S DEPOSITION

1 does not have an interest in her parents' house.

2 Q. I believe we've asked this before, however,
3 only with regard to one of the apartments. On either
4 of the apartments, have you ever seen an appraisal?

5 A. No. I haven't seen an appraisal on either of
6 them.

7 Q. Other than the spreadsheet that you've been
8 mentioning, are there any other documents that you
9 have seen related to this matter since December, 1991?

10 A. Yes. I told you there was a series of
11 contracts or proposed contracts or option agreements
12 between her and Clanton.

13 Q. Other than those?

14 A. She may have shown me very early on -- and
15 this would be in the fall of 1991 -- the capital
16 acquisition budget, and I don't want to put too fine a
17 spin on that. It would have been nothing more than a
18 listing of the items that she would have to acquire to
19 build a radio station from scratch and approximately
20 how much that would cost.

21 Q. And you say she may have shown you that?

22 A. Yes. At one point when I was in New York, I
23 may have seen it when she was working on it. But I
24 know we discussed the \$350,000 figure, and she told me
25 roughly how that was broken down, but it was in a

1 the checks because she sends me a Federal Express
2 package every day with litigation materials from the
3 cases we're working on, and they will send her the --
4 actually, it's a deposit slip. Funds are deposited in
5 my bank in New York, and a lot of times when that
6 happens, I'll ask her to be alert for the deposit slip
7 so she can tell me what the amount was so I can record
8 it in my books.

9 Q. What does she know about your debts
10 presently?

11 A. She knows what I've told her, which is my
12 only -- well, that's not true. I have one -- I have a
13 bank loan, but other than that my debt is the mortgage
14 on my house. She actually knows my debts as shown on
15 my balance sheet; so she knows what's on the balance
16 sheet.

17 Q. She knows of your debts from what she sees on
18 your balance sheet or sheets?

19 A. Right.

20 Q. Did you show her any other documentation
21 regarding your financial situation prior to December,
22 1991?

23 A. Did you say did I show her any
24 documentation? I don't believe so.

25 Q. After December, 1991, it would be the two

1 financial statements?

2 A. That's correct.

3 MR. DANIELS: Let's, for the record, mark as
4 Exhibit 1 the financial statement of November 30,
5 1991, which Mr. Dailey provided today, and let us mark
6 as Exhibit No. 2 the financial statement of August 27,
7 1993.

8 (The documents referred to were
9 marked Exhibits 1 & 2 for identification
10 by the reporter and attached hereto.)

11 BY MR. DANIELS:

12 Q. Let us elaborate, please, a little more
13 regarding Ms. Selznick's interest in owning a radio
14 station. When did she first discuss with you her
15 interest in owning a radio station?

16 A. Sometime in the spring of 1991.

17 Q. What did she say to you at that time
18 regarding such?

19 A. She told me then that she was thinking of
20 getting back into the radio business and buying a
21 station. I had just moved to California. I still had
22 not formally resigned from the firm. There was a
23 three- or four-month transition period, but I was in
24 California, and I was actively searching for a
25 business myself. I had not acquired RunTime

1 Q. Did she discuss with you whether she would
2 set up a corporation or a partnership for this
3 business venture?

4 A. No.

5 I suggested that she had to focus on that,
6 and that, depending on a variety of different things,
7 she might want to set it up as a limited partnership
8 or a corporation because, again, what she was doing
9 was going through all the sets of issues that I had
10 just gone through when I was purchasing my business,
11 but she had not -- she may have told me how she came
12 out. I don't recall that.

13 Q. During these conversations prior to her
14 filing the application, when she discussed the El Rio
15 frequency with you, did she discuss with you the
16 needed investment for equity for constructing and
17 operating the station?

18 A. Yes. As I said, she had very -- early on she
19 told me first that the license was available, it was a
20 new license, and that she believed that the station
21 could be built from scratch for no more than \$350,000
22 and that that was probably a very conservative figure
23 and that the actual amount might be less than that.

24 Q. What about operating it?

25 A. I believe she -- that \$350,000 may have

1 included some working capital -- I'm not clear on
2 that -- but I know that she believed that she could
3 get it to a positive cash flow probably within a year.

4 Q. Did you feel that that was a bankable deal --
5 strike that question.

6 Did you feel that was a bankable investment?

7 A. Is that -- I didn't have any feelings on that
8 because I didn't know how a banker would value the
9 license by itself and, also, at that point I
10 essentially told her that based on my -- based on
11 everything I had been seeing and reading in the
12 newspaper, banks were very rapidly withdrawing from
13 the business finance market presently because of the
14 savings and loan crisis. And it was that period where
15 the Feds were all over the banks and would not allow
16 them to make business loans on anything other than on
17 a fully secured basis.

18 Q. You said previously that Ms. Selznick did not
19 ask you to loan money related to this venture. How
20 did that come about?

21 A. Shortly after this opportunity came to her
22 attention, she told me she had a series of
23 conversations with a fellow by the name of Derrick
24 Cephas, who was a lawyer -- who used to be a lawyer at
25 Breed, Abbott & Morgan. I knew Derrick very well. He

1 one of these fellows who has this terrible schedule,
2 quite frankly, you know, something of a wheeler and
3 dealer at this point, and I know that it was around
4 November of 1991 and Loren was concerned because the
5 deadline for her filing her application was
6 approaching, and she was concerned that she might not
7 be able to get a commitment out of Derrick and his
8 group in time.

9 It was when she mentioned this to me during a
10 telephone conversation, I said, "Well, hell," I said,
11 "I'll provide the financing. I think this is a hell
12 of a deal. It's a much better deal than anything I
13 ever saw." So that occurred during a telephone
14 conversation.

15 There was then at least one or maybe two
16 other telephone conversations shortly thereafter where
17 she called back and she basically said, "Well, you
18 know, are you serious about this?"

19 And I said, "Absolutely." I kept saying, "I
20 think it's a hell of a deal. Don't ask me why the
21 government is doing it. It's giving you this
22 opportunity, but you have it," and "I'll tell you
23 this: " I told her, "It's a hell of a lot safer and a
24 lot less riskier than the business I'm in right now,"
25 which is a computer start-up company. So I said, "You

1 know, listen, I'll be glad to do it."

2 And it was either during that conversation --
3 there may have been a third conversation. In the
4 second conversation I basically confirmed that I was
5 going to do it because the first time I volunteered
6 it. Then she called back and wanted to be sure, you
7 know, I was really serious, and I told her I was. And
8 either that conversation or the following
9 conversation, I remember her asking me that under the
10 -- she had gotten an FCC lawyer, I guess, or she had
11 seen her application, and she needed some assurance
12 that I had the liquid assets to finance the
13 investment.

14 Q. When was this?

15 A. This, as I say, was either the second
16 conversation or the third conversation. There was
17 either two or three conversations. I'm not sure
18 which.

19 Q. Do you have an approximate date?

20 A. Yes, I do have an approximate date, and I
21 know I have an approximate -- I can date them all to
22 about the third week in November, 1991, and I do that
23 based on the conversation we're talking about what my
24 net worth was because part of my net worth was
25 dependent on receiving a check from my former law

1 station did appear to reach Oxnard, and I believe she
2 said that it did.

3 Q. Did you provide Ms. Selznick, at the time we
4 were speaking of, back prior to December, 1991, with
5 any written indication of your willingness to provide
6 the funds for the El Rio station?

7 A. No. She didn't ask for it, and I didn't
8 provide it to her. In fact, I did ask whether a
9 commitment letter was necessary, I believe, and she
10 said it was not. She told me that I would have to
11 provide a balance sheet, that she didn't need it right
12 then, but I would have to provide it. It was then we
13 had -- it was in this part of the conversation where
14 we then, in connection with her question whether my
15 assets were liquid, that we went over my balance
16 sheet. Because I asked her, I said, "Well, what does
17 the commission mean by liquid assets?" because I had
18 known that there were a whole number of different
19 definitions of liquid assets.

20 Q. What did she tell you?

21 A. I'm not so sure that she knew at that point
22 what they were.

23 And I had said, "Listen, let's go over my
24 balance sheet. I've got it right here." And I
25 brought it up in the computer screen, and we went over

1 item by item what would be considered and what would
2 not be considered and, obviously, the cash would be
3 considered liquid. And then there were the amounts
4 owed to me by Breed, Abbott & Morgan, and since those
5 were due to be paid in a relatively short period of
6 time, I said, "I believe those certainly would qualify
7 as liquid."

8 And, you know, between the cash and the
9 amount that was owed by the partnership, we were well
10 over the amount. I mean, we were at -- we were well
11 over \$500,000, which was far in excess. We stopped
12 there. We didn't get into the question of whether my,
13 you know, equity in my house would be considered
14 liquid or not.

15 Q. Did, at the time of this conversation, she
16 bring up your financial statement on her computer?

17 A. She didn't have it on her computer, to my
18 knowledge; it was on my computer.

19 Q. Did this conversation take place with you in
20 California and her in New York?

21 A. Yes.

22 Q. And when did you provide her your financial
23 statement?

24 A. It was relatively recently. I believe it was
25 in August of 1993, around the date of the second